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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1046

METRO M. HOLOVACHKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petitioner, Metro M. Holovachka, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 18, 1963.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals, attached hereto as Appendix "A" infra p. 1a is reported in 314 F. 2d 345.

JURISDICTION

The judgment of the Court of Appeals was entered February 18, 1963. (Appendix "B" infra p. 33a) Petitions for rehearing were denied March 28, 1963. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254(1).*

QUESTIONS PRESENTED

(1) Whether the trial court's unilateral action in changing the petit jury panels and compelling petitioner to be tried by an out-of-division jury amounted to a compulsory change of venue, or otherwise resulted in a violation of petitioner's constitutional right to a fair and impartial trial.

(2) Whether the requirements of due process of law were violated in an income tax evasion case by permitting: (a) the respondent to accuse the petitioner, a former Lake County (Indiana) prosecuting attorney, of receiving money from "Graft" when in fact no evidence of graft was in the record, and (b) numerous other prejudicial errors which occurred throughout the trial?

(3) Whether the safeguards and standards established by this Court in income tax evasion cases on the net worth-expenditure theory, e.g., in *Holland* v. *United States*, 348 U.S. 121 and related cases, were satisfied, particularly (but without limitation) as to starting point, burden of proof, current taxable income, likely source, corroboration?

(4) Whether the trial court's action in preventing petitioner from presenting his own theory of defense violated petitioner's constitutional right of due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

	Appendix "A" hereto
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The Sixth Amendment	page 35a
26 U.S.C.A., Sec. 7201	page 35a
28 U.S.C.A., Sec. 1865(a)	page 35a
Federal Rules of Criminal Procedure:	
Rule 18	page 36a
Rule 19	page 36a
Rule 21(a)	page 36a
General Information and Orders, U. S. District Court Northern District of Indiana	page 37a

STATEMENT OF THE CASE

The petitioner was indicted on three counts charging income tax evasion (*26 U.S.C.A., Sec. 72*, see infra App. "C" p. 35a) for the years of 1955, 1956 and 1957. The government, at the trial, relied on the so-called "net worth-expenditure" technique to establish its proof. The jury found the petitioner guilty as charged. The indictment alleged petitioner had reported an income tax liability of $11,893.81 for 1955, $10,486.75 for 1956 and $16,850.87 for 1957, whereas his correct tax liability for those years was $22,151.54, $31,523.91 and $24,893.48 respectively. The district court imposed concurrent sentences for three years on each of the three counts and a $10,000 fine on one count.

The indictment[1] was returned and trial held in the United States District Court for the Northern District of Indiana, in Hammond, Indiana. The Northern District of Indiana is divided (*28 U.S.C., Sec. 94*) into the Fort Wayne,

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[1] The instant indictment was returned January 12, 1962. Identical indictments had been returned on May 12, 1961, and September 28, 1961, the former for 1955 and 1956, the latter for 1957. Trial on the 1961 indictments commenced on November 13, 1961. Petitioner moved to quash the petit jury list on the basis that said jury was not properly drawn pursuant to *28 U.S.C., Sections 1861-1869*. After 29 jurors were examined (only 2 excused for cause) it was obvious the jurors were obtained only from "P.T.A." lists. The government thereupon joined in said motion and the jury was dismissed. Upon re-indictment by a new grand jury, the 1961 indictments were dismissed.

South Bend and Hammond Divisions. The district court has provided in its "*General Information and Order*" (see App. "C" p. 31a *infra*) that causes of action in the Hammond Division arising in the counties of Lake and Porter shall be filed at Hammond, whereas causes of action arising in the remaining 7 counties of the Hammond Division shall be filed at Lafayette. Court is held in Hammond or Lafayette depending on the origin of the case.

Petitioner was born in Gary, Lake County, Indiana, of immigrant parents from Czechoslovakia. Except for a few years while attending school, petitioner lived all of his 54 years in Gary. He practiced law and was active in politics as a Democrat in Gary and Lake County. During the indictment years he served (elected) as Prosecuting Attorney of Lake County. As prosecuting attorney he was not prohibited from practicing law nor did he represent the county in civil matters.

On January 2, 1962, a petit jury list of 75 persons, residents of Lake and Porter (adjoining) Counties, was drawn for the instant trial. On January 12, 1962, the trial court *suggested* a change of venue to Lafayette, about 100 miles from Hammond. This suggestion was objected to by petitioner who refused to consent to a change of venue.

On January 17, 1962, over petitioner's objection, the trial court on its own motion struck the entire Lake and Porter County panel of January 2. Thereupon petit jurors were drawn from the South Bend Division and Lafayette area of the Hammond Division, specifically excluding jurors from Lake and Porter Counties. Over objection, petitioner was tried by said jury summoned from outside

the vicinity or locality of the alleged offense. The petit jury was sequestered during the trial.

The government's case is based on its summary on the net worth-expenditure technique. Its expert witness admitted that the only evidence in the record of income not reported by the petitioner on the 1955-56-57 tax returns was the amount the expert computed on his "net worth" summary for those years (Gov. Ex. 186, App. 830).

The government used December 31, 1951 as its starting point. According to the government's summary, petitioner's taxable income not reported for 1955 was $18,718.06; 1956 was $22,329.43; 1957 was $15,885.07.

Government's Exhibit 186 "The Government's Summary of the Net Worth and Expenditures" was prepared by Special Agent Boyll. In preparing said exhibit he admitted that he had to pass upon and decide certain evidentiary issues in dispute both in and outside the record, in determining whether certain items and or amounts should or should not be included on Government's Exhibit 186. Petitioner's objection to said exhibit was denied by the trial court and completely disregarded in the opinion of the Court of Appeals. The disputed items involved amounts applicable to the starting point, as well as the specific years.

Petitioner attempted to introduce a net worth-expenditure summary (Def. Ex. 22). It was based on his theory of the evidence as to the proper treatment in the summary of $168,341 representing a tax-free return of petitioner's investment in special assessment bonds known as Barrett Bonds. Petitioner's theory was that this amount was current nontaxable income and as such was a deductive adjustment in the summary. This defense was

rejected by the trial court. The petitioner was compelled to introduce a net worth-expenditures summary based on the government and trial court's theory as to the crucial issue of the proper method of listing on said summaries the tax free return of investment from the Barrett Bonds. This dispute vitally affects the question of whether or not the government's summary is accurate.

The government established that petitioner received during the years 1953-1957 the amount of $168,341 as a tax free return on his investment in the Barrett Bonds.(c)

The government's summary listed as an asset as of December 31 for each year from 1952 through 1957 the net balance of petitioner's Barrett Bond investment (i.e. money invested minus money returned for each year).

Petitioner dealt in currency to a great extent. He explained this was a habit of his people and a practice taught him by his parents. The government illustrated that petitioner had currency transactions between 1952 through 1957 in the amount of $342,919. However, on the government's net worth summary he was not credited with one cent of cash on hand, either at the starting point or at any other year-end during that period.

The government did not offer any evidence of likely source; did not offer any evidence that its net worth increases were attributable to current taxable income; did

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(c) Barrett Bonds were issued by the City of Gary in connection with certain local improvements performed within the city, such as streets, curbs, gutters and sewers. Although there was a difference of opinion at the trial between the Treasury and Justice Departments, it is agreed that in the instant trial the return of principal is tax-free.

not offer any affirmative proof of falsity of petitioner's income tax returns; and did not offer any evidence to corroborate the alleged net worth bulge as computed on its summary.

On cross examination of the petitioner, the prosecution asked if petitioner received any money in "graft" payments (App. 1133). The court admonished the jury to disregard the question but denied petitioner's motion for mistrial.

Other trial incidents were claimed by the petitioner to have deprived him of a fair trial.

The trial consumed 19 days, 49 witnesses, 177 exhibits (including two net worth statements, 9 tax returns of the defendant and a stipulation of 46 pages), approximately 2700 reported pages of testimony, and instructions reported on 38 pages. The sequestered jury deliberated only 4 hours 15 minutes.

The Court of Appeals affirmed the petitioner's conviction. The petitioner is presently free on bail. The mandate of the Court of Appeals has been stayed pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S UNILATERAL ACTION IN CHANGING PETIT JURY PANELS AND IMPORTING JURORS FROM OUTSIDE THE VICINAGE OF THE ALLEGED OFFENSE AMOUNTED TO A COMPULSORY CHANGE OF VENUE AND ESTABLISHES DANGEROUS PRECEDENTS VIOLATIVE OF THE CONSTITUTIONAL SAFEGUARDS FOR A FAIR AND IMPARTIAL TRIAL.

The court below departed from the accepted and usual course of judicial proceedings by holding 28 *U.S.C.A. 1865(a)* (App. "C" infra p. 35a) can be employed to take away the right to a trial by an impartial jury guaranteed by the *6th Amendment* to the United States Constitution and the rights of a defendant in a criminal trial under *Rules 18, 19 and 21(a), Federal Rules of Criminal Procedure* (App. "C" infra p. 36a).

Petitioner, a life-long resident of Lake County, Indiana, was tried and convicted by a jury imported from the South Bend Division and that portion of the Hammond Division outside of Lake and Porter Counties. By a *unilateral ad hoc* order of the trial court, a panel of petit jurors drawn from Lake and Porter Counties was stricken 12 days before the trial was to commence. No objections had been made to the jurors from Lake and Porter Counties. The only applicable local district court rule is one of the *"General Information and Orders"* (App. "C" infra p. 37a) which states that causes of action arising in the counties of Lake and Porter shall be filed in Hammond. The rule intends that if the action is filed in Hammond,

it shall be tried in Hammond by a jury from Lake and Porter Counties. The district court in its announced reason, failed to support its action by any statute, decision, local rule, custom or practice. The Court of Appeal cites only the trial court as its authority.

The trial court justified its action on the alleged theory that because petitioner in 1961 objected to 1958-1959 newspaper stories, therefore petitioner was unable to obtain in 1962 fair and impartial jurors from Lake and Porter Counties. The Court of Appeals opinion concluded that petitioner's reference to 1958 and 1959 publicity justified the trial court's action, even though in *Beck* v. *U. S.*, 9 Cir., 298 F. 2nd 622 and *Delaney* v. *U. S.*, 1 Cir., 199 F. 2d 107 at 112, it was held that the prejudicial effect of publicity is not a continuing thing. Petitioner also objected on November 13, 1961 and January 29, 1962, to news stories obviously planted by government representatives.

Nowhere in the long record did petitioner at any time directly or indirectly suggest to the district court that fair and impartial jurors, legally selected, could not be obtained from Lake and Porter Counties. In fact petitioner maintained he could not receive a fair trial if jurors from Lake and Porter Counties were excluded. The record contains no showing that any of the January 2 panel harbored any prejudice against the petitioner or were in any way biased against him. The trial court's reasons are a strained, incorrect twisting of petitioner's motions. The action establishes a *subjective* test to be applied by trial courts resulting in an emasculation of the historic rights of a defendant to have something to say about the selection of the jurors.

On January 12, 1962, prior to striking the January 2, 1962, petit jury panel, the trial court attempted to persuade the petitioner to accept a change of venue to Lafayette. The petitioner objected to any change of venue.

The State of Indiana is divided into two distinctly, totally different areas. One is the Calumet Region (Lake and Porter Counties) the other, the balance of the state. Lake County is highly industrialized, has a large percentage of immigrants, and for years has been politically Democratic. Its 1960 population (per U. S. Bureau of Census, Department of Commerce) is 513,269. Porter County is 60,270. Their combined population represents approximately 41% of the entire South Bend and Hammond Divisions.

Another significant Bureau of Census statistic is that in 1960 in Lake County 11,569 residents were born in Czechoslovakia (birth place of defendant's parents) whereas in St. Joseph County (which comprises about 35% of the population of the South Bend Division) only 571 were born in said country.

The customs of immigrant parents, their practices with respect to handling cash, residents with knowledge of the habits and practices of the citizens of Gary, all vital issues in the trial, could be understood and appreciated only by the people from the Calumet Region, especially Lake County.

The grand jury which returned the instant indictment on January 12, 1962, contained residents from Lake and Porter Counties. After the trial court concluded that fair and impartial petit jurors could not be obtained from Lake and Porter Counties, he denied petitioner's motion to dismiss the indictment, holding, in effect, that grand

jurors from Lake and Porter Counties were not biased. This inconsistency in reasoning was approved by the Court of Appeals.

Rules 18, 19 and 21(a), Federal Rules of Criminal Procedure, clearly require the consent of a defendant for a change of venue from the division in which the alleged offense was committed. These rules are additional safeguards for securing a fair and impartial jury. As Mr. Justice Frankfurter said in *United States* v. *Johnson*, 323 U.S. 273 at 276, "Questions of venue in criminal cases are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

The Court of Appeals has sanctioned a practice amounting to a compulsory change of venue. There is no *real* difference between being compelled to try a case in Lafayette before jurors from Lafayette and being compelled to try a case at Hammond before jurors from Lafayette and South Bend. To do either without the consent of a defendant violates the said *Rules 18, 19 and 21(a)*. The court's action is in conflict with *Salinger* v. *Loisel*, 265 U.S. 224.

28 U.S.C. Section 1865(a) was not intended by Congress in any way to abrogate the aforesaid venue privileges of a defendant. Yet the Court of Appeals' interpretation conflicts with the rights of a defendant protected by the *6th Amendment* to enjoy a trial by an impartial jury. Otherwise, *28 U.S.C.A. 1865(a)* is unconstitutional in that it violates rights protected by the *6th Amendment*.

The effect of the action below is to provide a jury that is not a cross-section and is not representative of a defendant's community. This action is in direct conflict with the

principles set forth by this Court in *Glasser* v. *U. S.*, 315 U.S. 60, 86; *Thiel* v. *Southern Pacific Ry. Co.*, 328 U.S. 217.

To appreciate the potential of the instant opinion one need only consider two simple hypotheticals. A prominent Cook County (Illinois) politician, possibly with the status of Chicago's Mayor, on trial in the Northern District of Illinois, Eastern Division, and the trial judge reaches beyond Democratic Cook County into the traditionally Republican and anti-Cook County counties of the Western Division of the Northern District of Illinois. Or a prominent Negro in Lake County, Indiana, where negroes constitute approximately 15.5% of the total population of Lake and Porter Counties can now be tried by jurors imported from the Lafayette portion of the Hammond Division where negroes constitute only 00.31% of the total population. The announced reasons for said action could be the same specious, *subjective* basis as in the instant case. A sophisticated, political minded jurist need only point to the opinion below to accomplish his result, to satisfy a temptation, and abuse criminal justice.

The court's action of striking the jury panel without either a motion of the petitioner or a *voire dire* examination on the alleged theory of protecting the petitioner's constitutional rights is specious and ludicrous. This *unilateral* action based on the alleged desire to protect petitioner from adverse newspaper publicity, conflicts with the requirements for establishing the effect of adverse publicity in selecting a petit jury, see *U. S.* v. *Moran*, 2 Cir., 194 F. 2d 623, 625; *Blumenfield* v. *U. S.*, 8 Cir. 284 F. 2d 46, 50, 51. If there was any valid basis for dismissing the petit jury, the court should have also dismissed the grand jury indictment.

To sequester an imported jury in an income tax case violated the petitioner's constitutional rights to a fair and impartial jury. The petitioner was given no opportunity to determine in the voire dire examination the possible effect of said action. The effect of this surprising and unjustified action on the jury can never be honestly determined. On the other hand, the jury on the 23rd day of being locked up concluded its jury deliberation at 12:45 A.M. after only 4 hours and 15 minutes deliberation. Who can honestly say that this speedy conclusion to a lengthy and complicated trial was not the jury's stampede to unshackle itself from this involuntary incarcerafion?

II.

THE CONSTITUTIONAL SAFEGUARDS FOR A FAIR AND IMPARTIAL TRIAL WERE VIOLATED BY THE PROSECUTION WHEN IT INJECTED THE SUGGESTION OF "GRAFT," "RACKETS," AND "OTHER UNRELATED CRIMES" WITHOUT SUPPORTING EVIDENCE IN THE RECORD.

On cross examination, the prosecutor asked (App. 1133) if in 1955, 1956 and 1957 the petitioner received any money in *graft* payments. The prosecutor admitted that there was no evidence in the record to indicate the receipt of "graft" or to show where the net worth "bulges" came from. The use of the word "graft" was a knowing and deliberate attempt to prejudice the jury. The trial court denied petitioner's motion for mistrial but admonished the jury to disregard the question.

Another purpose of the "graft" question was to suggest a "likely source." In the courts below the government spent considerable time in justifying the question, relying primarily on *Ford v. U. S.*, 2 Cir. 237 F. 2d 57. The Court

of Appeals' opinion completely ignored the poisonous "graft" question, its purpose and damning effect.

The basis for the "graft" question had no support in the record even faintly comparable to the use of "graft" in *Ford* v. *U. S.*, 355 U.S. 38 wherein this court vacated the judgment of conviction (2 Cir., 237 F. 2d 57) with directions to dismiss the indictment. It also conflicts with *Ford* v. *U. S.*, 5 Cir., 210 F. 2d 313; *Dunn* v. *U. S.*, 5 Cir., 307 F. 2d 883.

Prosecutors need have no fear in the future (except to have the question stricken) when they suggest by question that a defendant obtained money from graft, vice, murder or by pushing heroin to teen-agers. The case below can be used by prosecutors as authority on this tremendously important principle.

The second government witness referred to the Senate (U. S.) Labor-Management (McClellan) Committee as the "*Rackets*" committee. The trial court failed to advise the jury to disregard the improper testimony. Thereafter the government during the trial frequently made reference to the committee under its proper name. The only purpose of all this action was to produce a constant dose of prejudice to the jury, not to establish the essential elements of the crime charged.

During the cross examination of the petitioner, the prosecutor suggested through questions that he committed three alleged violations of Indiana law. The fact that the government failed to legally establish these allegations or to establish their materiality and relevancy to the crime of income tax evasion was inconsequential to the Court of Appeals. The government did not believe they were inconsequential. The experienced prosecutor asked the

question for only one purpose, to prejudice the minds of the jurors.

The foregoing are the principal illustrations of some of the prejudicial acts which, taken together as a whole, violated the constitutional rights of a defendant to a fair and impartial trial. Each act cannot be treated in a vacuum.

The action of the instant case sanctioned by the Court of Appeals conflicts with the standards of this Court set forth in *Kotteakos* v. *U. S.*, 328 U.S. 750; *Bollenbach* v. *U. S.*, 326 U.S. 607.

III.

THE OPINION OF THE COURT OF APPEALS REDUCES TO A MEANINGLESS SHIBBOLETH THE ESTABLISHED STANDARDS IN INCOME TAX EVASION CASES ON THE NET WORTH-EXPENDITURE TECHNIQUE, THEREBY DEPRIVING PETITIONER OF DUE PROCESS OF LAW.

A. Starting Point Not Established.

The government's net worth starting point was December 31, 1951. Its computation of petitioner's net worth was then $70,321.43. The government's evidence also indicated that in the late 1940's petitioner had a net worth of between 68 to 78 thousand dollars.

Two disputed items affecting the government's starting point were handled in error by the government. These are:

1. *Cash on hand.* The government's summary did not include at the starting point, or for any year, one cent of cash on hand. The government claimed (a) for the period 1952 through 1957 that petitioner had currency transactions of $342,919; (b) that petitioner had no cash-on-hand on December 31, 1951; and (c) that in 1952 he handled $64,352 in cash (Gov. Ex. 187). Special Agent

Boyll, the government's expert witness, stated no cash-on hand was included because petitioner could not specifically recall (for as long as 8 years) the amount on hand on specific dates. This arbitrary action squarely conflicts with *Thomas* v. *C.I.R.*, 6 Cir., 223 F. 2d 83, 89-90; *Thomas* v. *Comm.*, 1 Cir., 232 F. 2d 520, 524-526; *Gunn* v. *Comm.*, 8 Cir., 247 F. 2d 359, 362-365; *Fuller* v. *Comm.*, 6 Cir., 313 F. 2d 73-77; *Phillips' Estate* v. *Comm.*, 5 Cir., 246 F. 2d 209, 213, 214; *Grubb* v. *Comm.*, 6 Cir., 4/9/63 No. 14744 (unreported), all of which hold such an arbitrary "guess" by the government as to cash-on-hand is not justified.

It is submitted that the government's facts do violence to its expert's conclusion there was no cash on hand. It must also be remembered that the government's summary was presented at the conclusion of its case and must be (especially in this case) an integral part of its burden of proof.

The government's error in omitting cash on hand from the starting point and for all years was actually motivated by the lack of a case. Cash on hand at the start would have materially weakened its case.

2. *The Lovelace Matter.* The government offered one witness and six exhibits concerning certain improved real estate to establish an asset of petitioner. A tentative net worth statement prepared by a revenue agent listed this property as petitioner's asset in 1951 and 1952.

Boyll testified that he did not include this property as petitioner's asset in the government's net worth summary because it was his *opinion* that this was not an asset of petitioner in 1951 and 1952, notwithstanding all of the government's evidence. The record established the value of this asset as of 12/31/51 (starting point) was $11,121.71.

This is another illustration of the government's failure to include known items in evidence in the starting point. The reason is obvious. To do so would increase the net worth at the starting point and automatically reduce or eliminate the so-called unreported taxable income.

The government's opening net worth was clearly inaccurate. Thus it directly conflicts with the requirements set by this Court that the opening net worth must be established by competent evidence with reasonable certainty. *Holland* v. *U. S.*, 348 U.S. 121, 132. See also *Fuller* v. *Comm.*, 6 Cir., 313 F. 2d 73, 77; *Thomas* v. *C.I.R.*, 6 Cir., 223 F. 2d 83, 89; *Thomas* v. *C.I.R.*, 1 Cir., 232 F. 2d 520, 524-526; *Phillips Estate* v. *C.I.R.*, 5 Cir., 246 F. 2d 209, 213, 214; *Grubb* v. *Comm.*, 6 Cir., 4/9/63 No. 14744 (unreported).

B. The Government's Expert Witness Unconstitutionally Invaded the Province of the Jury in Preparing the Government's Net Worth Summary.

The burden of proof in criminal income tax evasion cases is still on the government, according to the *Holland* case, p. 138.

In discharging its burden in circumstantial evidence cases such as the net worth-expenditure technique the government uses an "expert" witness to summarize the evidence. This practice is permitted in these complicated cases on the belief that laymen jurors cannot intelligently summarize the evidence. See *Grayson* v. *Williams*, 10 Cir., 256 F. 2d 61, 63.

In the instant case, Special Agent Boyll was the government's expert. He prepared the net worth summary. In *nine* instances, Boyll acted as the "13th juror" while also testifying as an "*expert.*" Three of the *nine* instances in

summary are: (1) cash on hand; (2) Lovelace matter (see pp. 16, 17 herein); and (3) Barrett Bonds (see pp. 23-27 herein).

In each of the other six items of the government's evidence, Boyll obviously did not *believe* the evidence. The government's net worth summary as to these nine items was computed on the basis of Boyll's decision of these evidentiary issues. Boyll presented to the jury his opinion as to the ultimate fact to be decided by the jury—namely, that all the fact disputes which he resolved, and all the elementary issues, when evaluated as shown on his summary, establish unreported taxable income. The full impact of this conclusion by the so-called expert in the final stages of trial was left to settle like a shroud of guilt over the petitioner.

Petitioner's motion to strike government's summary on the basis that it was Boyll's *assumption, evaluation* and *conclusion* of disputed evidence was denied. As each disputed item was an integral part of the government's computation, Boyll had to act as a "13th juror" in order to decide these crucial evidentiary problems in favor of the government. The government could not risk permitting the jury to decide, one by one, each crucial item and then compute the final result. In approving Boyll's conduct, the court's opinion is in conflict with the acceptable conduct of an "expert" as announced in *U. S.* v. *Ward*, 3 Cir., 169 F. 2d 460, 462, 463; *Steele* v. *U. S.*, 5 Cir., 222 F. 2d 628-631.

Each of the nine crucial evidentiary questions was solely for the jury. Yet, by Boyll deciding how to treat them on the net worth summary, each question loses its identity and becomes buried in the final result of the government's

summary. It is naive to believe that any jury—in four hours—could consider and evaluate each evidentiary issue, then adjust the end result (up or down on a summary) by their own decision. Thus the invasion of the jury's function becomes complete merely by virtue of the nature of the complicated net worth summary cases.

C. Current Taxable Income and Likely Source.

There was no direct evidence of willfully unreported, current taxable income or of a likely source for 1955, 1956 and 1957. In the *Holland* case (p. 137) this Court held that in net worth cases, there must be evidence supporting the inference that the net worth increases are attributable to currently taxable income.

This Court recognized that the net worth theory of prosecution based on circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation, *Holland* case at p. 129.

The government's theory in the trial court (App. 100) was to plant in the minds of the jury that petitioner's unreported income stemmed from "graft." Of course, there was no such evidence, of any variety, in the record. Therefore the government planted the prejudicial "graft" and "rackets" references at the start and finish of the trial to provide a "likely source." Before the Court of Appeals the government suggested that the "bulge" in its net worth summary could be inferred from "graft"; therefore "graft" was the unreported *current taxable income* and *likely source*.

The Court of Appeals avoided the "graft" theory and adopted a new concept "*some taxable source* of income" (emphasis supplied) (Opinion App. "A" infra, p. 26a).

Then obviously recognizing the novelty of its assertion, the Court of Appeals discovered that the source was petitioner's unreported professional income. The government, of course, never advanced that theory because its theory was that petitioner was too busy as a "Prosecuting Attorney" and, anyhow, never had any practice of law. Thus at the trial the government conceded that the alleged unreported income did *not* come from the same source as produced the petitioner's reported income.

Neither the prosecutor nor the Court of Appeals ever identified a "source" as "current taxable income" which was *unreported*.

In *Holland* case at pp. 137, 138, this court said:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to *currently taxable income*. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang is sufficient." (Emphasis supplied)

The aforesaid language fits precisely the instant facts. The government's case is based on a net worth summary, computed by an expert who acted as a "13th juror" to establish a "bulge" which the government hopes will be *assumed* to be *currently taxable income*. This theory conflicts with *Thomas* v. *Comm.*, 1 Cir., 232 F. 2d 520, 526; *Kashat* v. *Comm.*, 6 Cir., 229 F. 2d 282, 285. Also see *Mertens*, Law of Federal Income Taxation, Vol. 10, Sec. 55A. 27a at p. 127.

It is recognized that in *U. S.* v. *Massei*, 355 U.S. 595 (affirming 1 Cir., 241 F. 2d 895) in affirming the reversal of a lower court for prejudicial conduct similar to the instant case, this Court did say that proof of likely source was not necessary in every case. This was so, should *all*

possible sources of non-taxable income be negatived. In the instant case, notwithstanding the assertion of the Court of Appeals, the record will show with abundant clarity that the government or trial court disregarded and arbitrarily rejected the evidence. It did not negative all possible sources.

In *Ford* v. *U. S.*, 355 U.S. 38, this court remanded with directions to vacate a judgment of conviction and dismiss the indictment (2 Cir., 237 F. 2d 57). This *Ford* case involved the same "graft" theory and no likely source as in the instant case.

Certainly where there is no direct evidence of any unreported current taxable income, certainly where there is no evidence of likely source, the *Massei* opinion cannot be interpreted to further reduce the burden of proof rightfully imposed on the government in this type of cases.

The foregoing emphatically illustrates the hazards of defending a net worth prosecution. This court has recognized that net worth prosecution cases are fraught with danger. The standards thought to have been established in net worth cases have not served to safeguard a defendant's rights guaranteed by the *5th Amendment*.

D. Fraudulent Intent Was Not Established.

The government admitted that the only evidence of unreported income was the amount computed on its net worth summary (Gov. Ex. 186) (App. 830). Deductions claimed by petitioner on his returns were not disputed. Petitioner had no concealed bank accounts and reported all interest and dividends received during the taxable years.

There is no direct evidence of any act tending to establish fraudulent intent of tax evasion for the indictment

years. Likewise, there is no direct evidence that petitioner omitted one cent of reportable income during the indictment years.

The Court of Appeals stated (Opinion App. "A" infra p. 26a) *in error* defendant conceded an underreporting of income of $6,106.09 for the year 1956. This is another glaring illustration of a lack of understanding of the net worth summary technique.

The government's case is based on uncorroborated inferences of incredibility. The court's opinion admits that the government's case is based solely on inferences. Its case is based entirely on its own net worth summary. There is no corroborated independent evidence to establish intent to evade taxes. It therefore violates the warning of this court in the *Holland* case at p. 128:

> "* * * bare figures have a way of acquiring an existence of their own, independent of the evidence which gives rise to them."

In *Smith* v. *U. S.*, 348 U.S. 147 and *U. S.* v. *Calderon*, 348 U.S. 160 this court held affirmative admissions of tax evasion must be corroborated to support a conviction. There is no affirmative evidence of tax evasion in the instant case.

IV.

THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT GAGGED THE PETITIONER AND DENIED HIM THE OPPORTUNITY OF PRESENTING A FAIR REBUTTAL TO THE GOVERNMENT'S 13th JUROR.

During the years 1952 through 1957 petitioner received $168,341.03 as a tax-free return on his investment in City of Gary Improvement Contracts and Barrett Bonds. For

the years 1955-56 and '57 the amounts of said tax free funds paid to petitioner were respectively $14,383.48, $7,007.81 and $16,882.52.

Petitioner's expert witness offered his net worth computation (Def. Ex. 22) which, upon objection of the government, was not admitted. Petitioner's expert theory was that as petitioner had re-invested these tax-free funds, it was necessary to deduct as *non-taxable* income the amount received each year; e.g. in the adjustment section of the summary there should be deducted for 1955 the $14,383.48, etc. This theory is based on the explanation of so-called "net worth" summaries set forth in *David H. Schultz*, 30 TC 256 at 275, (rev'd for other grounds, 5 Cir., 278 F. 2d 927); and "A Paper Submitted at a Symposium of the American Bar Association, Section of Taxation on Tax Fraud Procedures and Law" by *Meyer Rothwacks*, Chief, Criminal Section, Department of Justice, dated September 19, 1950, pp. 13-14 (not an official expression of the Department). The trial court's refusal to permit this reasonable theory to be presented to the jury was affirmed by the Court of Appeals which claimed this would be a double deduction.

We submit the refusal is based on a lack of understanding of this dangerous technique which has been developed in recent years and amounts to a violation of the *5th Amendment*. The court's action also disregards the basic law that the jury has the exclusive responsibility of determining the ultimate facts.

The so-called "net worth" summary is a misnomer. The technique ("fraught with danger") has been developed in an attempt to reconstruct current unreported taxable income. It must go beyond the pure net worth, i.e. assets

minus liabilities. The technique properly employed first determines the increase in net worth for a particular year. Then is *added* non-deductible expenses. Then is *deducted* non-taxable receipts, e.g., gifts, inheritances and *non-taxable income*. These deductions are necessary, as said in the *Schultz* case, supra, at p. 275, since such increments to the taxpayer's assets are reflected in the increase of his net worth during the taxable year, and since *they are non-taxable they must be subtracted in order to ascertain the taxable net income for the years in question.*

The government admitted at the trial petitioner received these amounts of non-taxable income; that these monies were plowed back into the other assets of the petitioner in the year received. It therefore follows petitioner's assets were increased by non-taxable funds. The government's theory was that by reducing the running investment in said bonds by the amount received each year the petitioner had received the proper adjustment. This theory supposes the amount received vanished and did not re-appear in the other assets. Yet it admits the tax-free funds were re-invested and are blinded to the fact that in this dangerous technique they now are charging petitioner with unreported taxable income caused by the use of said tax-free funds.

The government and the courts below claim, *without authority*, petitioner's theory is not correct because it would produce a "net worth decrease." This illustrates a lack of understanding of the system. It also illustrates the system should not be used as a basis of depriving a person—by conviction—of his liberty. The end result is *not* a *net worth* increase or decrease. It is supposed to establish unreported taxable income. The petitioner's theory (Def.

Ex. 22) illustrates he had adequate tax-free funds on hand during the entire period. The petitioner's theory will also establish there was no current, unreported taxable income.

The petitioner was permitted to introduce a net worth summary (Def. Ex. 25) computed on the trial court and government's theory.

It is fundamental that a defendant should have the right to explain away the force of a criminal charge. To deprive a defendant of the right to make his explanation of the crime charged is erroneous. The lower court's action conflicts with, *Watkins* v. *U. S.*, 1 Cir., 287 F. 2d 932, 933, 934; *U. S.* v. *Peach Mountain Coal Min. Co., et al*, 2 Cir., 161 F. 2d 476, 478, 479; *Heindel* v. *U. S.*, 6 Cir., 150 F. 2d 493, 497; *Continental Baking Company* v. *U. S.*, 6 Cir., 281 F. 2d 137, 141-143; see also *Wigmore*, (3rd Ed.) Vol. I, Sec. 34, p. 423 and Vol. II, Sec. 239, p. 37; *Wharton's* Criminal Evidence, (12th Ed.) Vol. I., Sec. 211, p. 431.

By depriving a defendant of the right of presenting his defense (on a transaction in which at the trial there was a difference between the Treasury and Justice Departments (App. 737)) there is now established the shocking precedent that if a defendant's theory differs from the government, the defense can be rejected, e.g., disputes on the right to defer income already received but not yet earned; is a certain substance a narcotic; difference between ballistic experts over a fatal bullet. This is a significant departure from traditional precepts of justice.

When a defendant's conviction hangs on the flimsy thread of a technical question as to the right application of $168,341 tax-free funds when the total unreported taxable income claimed only equals $71,585, certainly due

process of law demands the right to present the defendant's theory to the jury. In fact, it is submitted the question really goes to whether the government's summary (Gov. Ex. 186) is correct, and whether the defendant's motion for acquittal was erroneously denied.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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